No. 92-6281

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In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT HAGEN, PETITIONER

v.

STATE OF UTAH

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Uintah Indian Reservation in Utah was diminished by the Act of May 27, 1902, ch. 888, 32 Stat. 245, or the Act of March 3, 1905, ch. 1479, 33 Stat. 1069.

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This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On October 3, 1861, President Lincoln established an Indian reservation along the Uintah River in the Territory of Utah. Exec. Order No. 38-1. Congress confirmed the President's action in 1864, providing that the land in question was "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of [the Utah] territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63.

In 1902, Congress passed an Act providing that if a majority of the adult male members of the Uintah and White River Tribes of Ute Indians consented, the Secretary of the Interior should make allotments by October 1, 1903, out of the Uintah Indian Reservation; the allotments were to be in the amount of 80 acres to each head of a family and 40 acres to each other member of the Tribes. Act of May 27, 1902, ch. 888, § 1, 32 Stat. 263-264. That Act further provided that when the October 1, 1903, deadline passed, "all the unallotted lands within said reservation shall be restored to the public domain," and that those lands would be subject to entry under the homestead laws, at a rate of $1.25 per acre. 32 Stat. 263. Finally, the Act provided that the net proceeds of the sale of the lands restored to the public domain, "under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians." 32 Stat. 264.[1]

Because of the steady opposition of the Uintah and White River Tribes, the allotments did not proceed as provided for by the May 1902 Act. As a compromise, Congress in 1903 directed the Secretary to allot the land unilaterally if the Indians did not give their consent by June 1 of that year. Act of Mar. 3, 1903,

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[1] A month later, Congress supplemented the May 1902 Act with a provision requiring the Secretary,

> [i]n addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, * * * [to] select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

Joint Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902).

ch. 994, § 1, 32 Stat. 997-998. The March 1903 Act also extended the time for the "opening [of] the unallotted lands to public entry on said Uintah Reservation" until October 1, 1904. 32 Stat. 998. When the Tribes continued to oppose the plan, Congress again deferred the opening date, to March 10, 1905. Act of Apr. 21, 1904, ch. 1402, § 1, 33 Stat. 207-208.

By the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, Congress again deferred the time for opening the unallotted lands to public entry, this time to September 1, 1905, unless the President determined that the lands should be opened at an earlier date. § 1, 33 Stat. 1069. The March 1905 Act then specified "the manner of opening such lands for settlement and entry, and for disposing of the same." *Ibid.* Specifically, it provided that the unallotted lands (except for tracts set aside as a national forest reserve and certain mineral lands disposed of in 1902) "shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* All lands "opened to settlement and entry under this Act remaining undisposed of [within five years]" were to "be sold and disposed of for cash, under rules and regulations prescribed by the Secretary of the Interior." *Ibid.* The proceeds of the sale of unallotted lands were to be applied, in accordance with the May 1902 Act, for the benefit of the Tribes. 33 Stat. 1070.

2. In 1989, petitioner was charged with distribution of a controlled substance in the District Court of Duchesne County in Utah. The offense occurred in the Town of Myton, which is within a portion of the original Uintah Reservation that was opened to non-Indian settlement by the March 1905 Act. Petitioner initially pleaded guilty. Before sentencing, however,

petitioner filed a motion to arrest the judgment and to withdraw his guilty plea; he contended that the trial court did not have jurisdiction because he is an Indian and the crime had been committed in "Indian country" that is not subject to the jurisdiction of the State of Utah.[2] The state trial court denied that motion, finding that petitioner is not an Indian for purposes of principles governing state jurisdiction over crimes committed by or against Indians in Indian country. Pet. App. I; see Pet. App. A.

3. The Utah Court of Appeals reversed. *State* v. *Hagen*, 802 P.2d 745 (1990). The court noted that the Tenth Circuit has held that Myton and other areas opened to non-Indian settlement by the 1905 Act remain within the Uintah Indian Reservation. *Id.* at 747 (citing *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985) (en banc), cert. denied, 479 U.S. 994 (1986)). The court also concluded that the State failed to introduce sufficient evidence in the trial court in this case to justify a finding that petitioner is not an Indian. 802 P.2d at 747-748. Accordingly, the court reversed petitioner's conviction and ordered him discharged. *Id.* at 748.

4. The Utah Supreme Court granted the State's petition for a writ of certiorari and reversed the

[2] "Indian country" is defined by 18 U.S.C. 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States government." As a general matter, a State has jurisdiction over an offense committed by or against an Indian in Indian country only where Congress has granted jurisdiction to the State—*e.g.*, under Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588-590. See, *e.g.*, *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470 (1979). Utah has not acquired jurisdiction over Indian country pursuant to Public Law 280.

decision of the Utah Court of Appeals. Pet. App. A1. In a brief opinion, the court explained that it viewed the case as controlled by its decision in *State* v. *Perank*, Resp. Br. App. 4a-75a,[3] which was issued on the same day as the decision in this case. In *Perank*, the Utah Supreme Court concluded that the May 1902 Act and the March 1905 Act diminished the Uintah Indian Reservation and that the town of Myton accordingly lies outside the boundaries of the Reservation. See *id.* at 28a-63a. Relying on that conclusion in *Perank*, the Utah Supreme Court reinstated petitioner's conviction. Pet. App. A1.

DISCUSSION

The decision of the Utah Supreme Court in this case conflicts with the resolution of the same question by an en banc decision of the federal court of appeals having jurisdiction over cases arising in Utah. *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087, 1088-1089 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986). Moreover, in our view the decision incorrectly applies the principles set forth by this Court for determining when an Act of Congress will be held to have diminished an Indian reservation. Accordingly, the petition for a writ of certiorari should be granted.[4]

[3] The *Perank* decision also appears in photocopy form at Pet. App. B. For convenience, we cite to the opinion as reprinted in the appendix to respondent's brief acquiescing in certiorari.

[4] Because the Utah Supreme Court concluded that the offense in question did not occur in Indian country, it did not decide whether petitioner is an Indian who is immune from state jurisdiction for acts committed in Indian country. See Pet. App. A. Petitioner claims to be a member of the "Little

1. Like several of this Court's previous cases, the present controversy turns on the effect of a surplus land Act opening an Indian reservation to settlement by non-Indians. The Congress that passed that statute (and others like it) no doubt anticipated the eventual demise of the reservation system. But this Court has

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Shell Tribe of Chippewa Indians." See *State* v. *Hagen*, 802 P.2d 745, 747 (Utah Ct. App. 1990). The Department of the Interior does not recognize such a tribe. See List of Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 53 Fed. Reg. 52,829 (1988). Although Congress in 1982 provided for distribution of judgment funds to members of the Little Shell Tribe of Chippewa Indians, it specifically acknowledged that the Tribe was not federally recognized. Act of Dec. 31, 1982, Pub. L. No. 97-403, § 6, 96 Stat. 2023-2024. The Department of the Interior has informed us that the Little Shell group did not pursue its petition for federal recognition following enactment of the 1982 legislation distributing the judgment fund.

Indian status for jurisdictional purposes is dependent upon some affiliation (although not necessarily enrollment) with a federally-recognized Indian tribe or entity, see *United States* v. *Antelope*, 430 U.S. 641, 646-647 n.7 (1977), even if only by descent, cf. 25 U.S.C. 479. For that reason, petitioner's status apparently would not bar the exercise of state jurisdiction in this case even if, as we submit, his offense did occur in Indian country. The diminishment/jurisdictional issue therefore comes to the Court in a decidedly hypothetical context. Nonetheless, because the Utah Supreme Court already had decided that issue in the companion *Perank* case, it is understandable that it then would choose to apply that ruling in this case, without reaching the question of petitioner's status as an Indian. And whatever the wisdom of proceeding in that manner, the fact remains that the Utah Supreme Court did decide the diminishment/jurisdictional issue in this case as well as *Perank*, and thus the question is properly presented in this case.

never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, see, *e.g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and other surplus land Acts did not, see, *e.g.*, *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

Solem v. *Bartlett*, 465 U.S. 463, 468-469 (1984). As the Court explained in *Solem*, the Court's prior decisions have established a "fairly clean analytical structure" for distinguishing those surplus land Acts that of their own force effected an immediate diminishment of the reservation from those that simply permitted non-Indians to purchase land within an existing reservation and left to another day the actual redrawing of its boundaries. *Id.* at 470.

The "first and governing principle" is that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. The most probative evidence of congressional intent is the statutory language used to open the reservation. Language that explicitly refers to a "cession" or otherwise "evidenc[es] the present and total surrender of all tribal interests" in the opened area suggests that Congress means to sever it from the reservation. *Ibid.* When such language is accompanied by an unconditional commitment to compensate the tribe, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."

Id. at 470-471. Cession language and unconditional compensation are not, however, absolute prerequisites to a finding of diminishment. "When events surrounding the passage of a surplus land Act * * * unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," the Court has inferred that Congress intended to diminish the reservation. *Id.* at 471. "There are, of course, limits to how far [the Court] will go to decipher Congress' intention in any particular surplus land Act." *Id.* at 472. Accordingly, if the text and legislative history of the Act fail to reveal "substantial and compelling evidence of a congressional intention" to diminish, the "traditional solicitude for the Indian tribes" requires a ruling that the reservation remains intact. *Ibid.*

Application of the foregoing principles makes it clear that the land in question here has not been removed from the Uintah Indian Reservation.

a. *The Act of Mar. 3, 1905.*—Our analysis begins with the 1905 Act, which opened a portion of the Reservation to non-Indian settlement. It was that Act that, by its terms, specified "the manner of opening such [unallotted] lands for settlement and entry, and for disposing of the same." 33 Stat. 1069. It provided that the "unallotted lands on the Uintah Reservation * * * shall be disposed of under the general provisions of the homestead and town-site laws of the United States." *Ibid.* That language does not refer to a "cession" or otherwise "evidenc[e] the present and total surrender of all tribal interests" in the unallotted lands, *Solem*, 465 U.S. at 470.[5] More-

[5] Compare *DeCoteau* v. *District County Court*, 420 U.S. 425, 445 (1975) (finding disestablishment where Indians did "cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands"); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 596-597 (1977) (finding diminishment where Indians did "hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted").

over, it is clear from this Court's cases that language generally providing for disposition of lands under the homestead laws is not sufficient to work a severance of the lands from an Indian reservation. As the Court unanimously held in two pre-*Solem* cases, such statutes did not terminate a reservation, but merely "open[ed] the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." *Mattz* v. *Arnett*, 412 U.S. 481, 497 (1973) (quoting *Seymour* v. *Superintendent*, 368 U.S. 351, 356 (1962)).[6]

The limited import of the 1905 Act is underscored by its failure to provide for payment of a sum certain by the United States, which might have suggested an intent to effect an immediate divestment of all tribal interest as a quid pro quo. *DeCoteau* v. *District County Court*, 420 U.S. 425, 445-446 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 598 n.20 (1977). Rather, the Tribe was to receive nothing until and unless unallotted lands were sold, and in the meantime it retained an equitable interest in

[6] Indeed, although the *Solem* Court did not focus on the point, the Act involved in *Solem*—which was held insufficient to effect a diminishment—also provided for the disposition of unallotted lands under the "homestead and town-site laws." Act of May 29, 1908, ch. 218, § 2, 35 Stat. 461.

them. *Ash Sheep Company* v. *United States*, 252 U.S. 159, 166 (1920). In similar circumstances, where a statute "benefited the tribe only indirectly, by establishing a fund dependent on uncertain future sales of its land to settlers," *DeCoteau*, 420 U.S. at 448, this Court has concluded that Congress did not intend to diminish a reservation. As the Court explained in *Seymour*, an Act that merely opens surplus lands for non-Indian settlement, with the proceeds of land sales to be held in trust for the tribe, is generally understood as leaving reservation boundaries intact. 368 U.S. at 355-356.

b. *The Act of May 27, 1902.*—The 1902 Act also fails to furnish the "substantial and compelling evidence of a congressional intention" to diminish, *Solem*, 465 U.S. at 472, that is a necessary condition to holding that the lands at issue in this case have been removed from the Uintah Indian Reservation. The principal feature of the 1902 Act that respondent cites as supporting a finding of diminishment is the phrase stating that the unallotted lands would "be restored to the public domain." 32 Stat. 263.[7] Respondent correctly notes (Resp. Br. 17-18) that this Court has suggested that the use of statutory language requiring restoration of Indian lands "to public domain" is evidence of a congressional intent to disestablish. But in our view respondent greatly overstates its case in arguing (Resp. Br. 17) that the language provides "firm and unequivocal language of disestablishment."

As the Court made clear in *Solem*, statutory language indicating that surplus lands were to be "part of the public domain" is "hardly dispositive," because

[7] The Utah Supreme Court placed great weight on this phrase in its decision in *Perank*. Resp. Br. App. 20a-28a.

such a reference could have meant simply that the lands were opened to settlement. 465 U.S. at 475 & n.17; see also *Newhall* v. *Sanger*, 92 U.S. 761, 763 (1876) ("The words 'public lands' are habitually used * * * to describe such as are subject to sale or other disposal under general laws."). In so ruling, the *Solem* Court expressly rejected the notion that a reference to the "public domain" has a talismanic effect that renders it unnecessary to consider other aspects of the text, the legislative history, and the surrounding circumstances. 465 U.S. at 475 & nn.16-17.

More importantly, respondent's exclusive reliance on the "public domain" language in the 1902 Act ignores the conditioning of the allotment and restoration provisions of the 1902 Act upon the Indians' consent, 32 Stat. 263-264, which was not forthcoming. When Congress unilaterally opened the unallotted lands pursuant to the 1905 Act, it did not carry forward the language in the 1902 Act that would have restored those lands to the "public domain." Instead, the 1905 Act provided simply that the unallotted lands were to be "disposed of under the general provisions of the homestead and town-site laws of the United States." 33 Stat. 1069. As we have explained above, this Court's decisions in *Solem*, *Mattz*, and *Seymour* all make it clear that language like the language on which respondent relies is not sufficient to require a holding that a reservation has been diminished or disestablished.

At bottom, the Utah Supreme Court's analysis rests on the conclusion that the 1905 Act evidenced an intent to diminish the Uintah Indian Reservation by implicitly incorporating a phrase from the 1902 Act. Given the omission of that phrase from the 1905 Act, the failure of the conditions on which the 1902 Act

was predicated, and the ambiguity of the phrase in the first place, we submit that respondent has failed to carry its burden of producing substantial and compelling evidence of a congressional intention to diminish. Accordingly, we believe that the Utah Supreme Court erred in holding that the Reservation was diminished.

2. The decision of the Supreme Court of Utah directly conflicts with the en banc decision of the Tenth Circuit in *Ute Indian Tribe* v. *Utah*, 773 F.2d 1087 (1985), cert. denied, 479 U.S. 994 (1986). In that case, the Tenth Circuit held that the provisions of the 1902 and 1905 Acts opening portions of the Uintah Indian Reservation to non-Indian settlement did not diminish that Reservation. 773 F.2d at 1088-1089.

As this Court has recognized, a conflict regarding the extent of Indian country within a State between the decision of the highest court of a State and the federal court of appeals having jurisdiction in the State presents significant difficulties that call for the exercise of this Court's certiorari jurisdiction. See *Solem* v. *Bartlett*, 465 U.S. 463, 466 (1984); *DeCoteau* v. *District County Court*, 420 U.S. 425, 430-431 (1975). This case is different in one significant respect, however. The contrary ruling by the federal court of appeals was rendered in a case brought by the Tribe itself against the counties in which the land in question is situated, with a view toward broadly resolving the diminishment/jurisdictional issue. Neither the State nor the counties objected to the nature of that lawsuit; indeed, the State voluntarily intervened in the case. We therefore share the Tribe's disappointment—as evidenced by the Tribe's filings in the federal district court seeking injunctive relief to enforce the declaratory judgment in the *Ute Indian*

Tribe case (see Resp. Br. 12)—that the State sought to reopen that issue in state court in this case and *Perank*.[8] Moreover, under the doctrine of collateral estoppel, the decision in the Tribe's favor in *Ute Indian Tribe* presumably would at least bar the State (in a case in which the defense was properly raised [9]) from prosecuting a member of the Tribe for a crime committed within any area the Tenth Circuit held to remain in the Reservation, because tribal members are in privity for present purposes with the Tribe. Cf. *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 468-469 n.7 (1976).

In the end, however, we do not believe that those considerations sufficiently distinguish the conflict here from the conflicts that led the Court to grant review in *Solem* and *DeCoteau*. The Tribe thus far has sought to prevent state prosecution only of tribal members for crimes committed in the disputed areas, and it is not clear in any event that the preclusive effect of the federal court judgment in *Ute Indian Tribe* would extend to anyone other than members of the Tribe. Accordingly, as the opinion in *Perank* suggests (see Resp. Br. App. 7a n.3), the judgment in *Ute Indian Tribe* probably would not be given the effect in the Utah state courts of barring prosecutions

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[8] By order dated December 17, 1992, the federal district court in the *Ute Indian Tribe* case deferred ruling on the Tribe's motion for an injunction to enforce the declaratory judgment in that case until April 14, 1993, in light of the pendency of the certiorari petition in this case. In doing so, the district court expressed the view that it would await this Court's disposition of the petition raising the jurisdictional issue in this case. Slip op. 3.

[9] The defense of collateral estoppel apparently was not raised in *Perank*. See Resp. Br. App. 7a-8a & n.3.

of *non-Indians* who commit crimes against Indians (which would be within exclusive federal jurisdiction under 18 U.S.C. 1152 if the areas in question remain part of the Reservation). It probably also would not be given the effect of barring prosecutions of Indians who are not members of the Tribe. Finally, as the Utah Supreme Court pointed out (Resp. Br. App. 8a n.3), the diminishment/jurisdictional issue can arise in civil cases to which the State and counties are not parties, and in which the doctrine of collateral estoppel therefore would not be applicable. In fact, *Brough* v. *Appawora*, 553 P.2d 934 (Utah 1976), vacated, 431 U.S. 901 (1977), was such a case. Accordingly, we do not urge the Court to deny review because of the possibility of a collateral estoppel bar in some future cases.[10]

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[10] The Court invited the Solicitor General to file a brief when the State of Utah filed a certiorari petition seeking review of the judgment of the Tenth Circuit in *Ute Indian Tribe* holding that the Reservation had not been diminished. We took the position that consideration of the question was not warranted at that time, because the Utah Supreme Court had not considered the question in light of *Solem*, but we suggested that review would be appropriate if that court adhered to its view in a future case. Gov't Br. at 14-15, *Utah* v. *Ute Indian Tribe*, No. 85-1821 (O.T. 1986). Because the Utah Supreme Court has adhered to that view (previously articulated in *Brough* v. *Appawora*, *supra*) in the face of *Solem* and the decision of the Tenth Circuit, we believe that plenary review is now appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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